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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, APPELLANT,

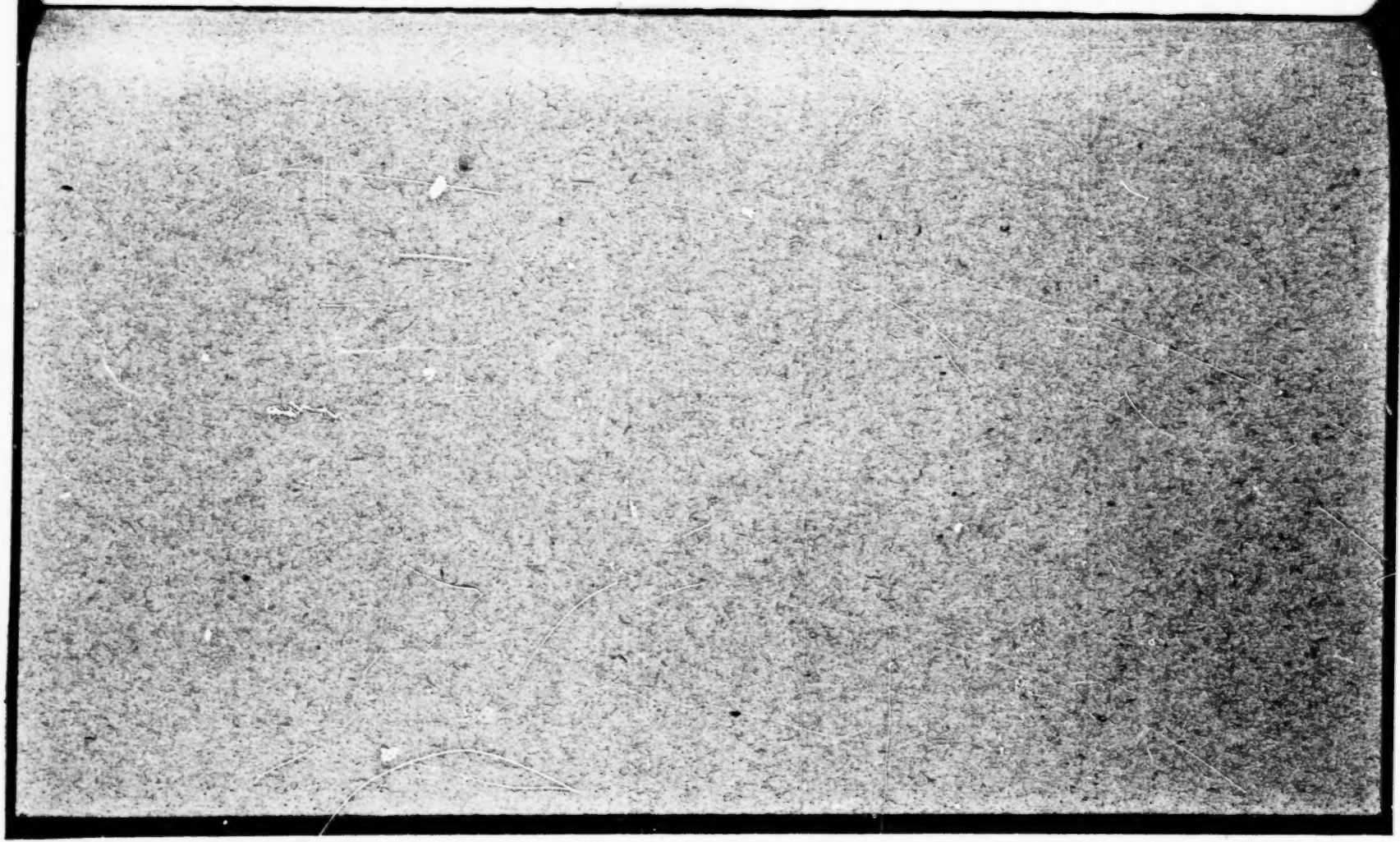
vs.

W. G. QUERY, J. P. DERHAM, AND F. C. ROBINSON, PERSONALLY AND AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

FILED JUNE 20, 1931

(35,984)



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INDEX

	Original	Print
Proceedings in supreme court of South Carolina	1	1
Caption	1	1
Petition and complaint	2	2
Statement re summons	13	13
Rule to show cause	13	13
Notice and demurrer	15	15
Stipulations re judgment, etc	16	16
Opinion, Cosgrove, J., and judgment	19	19
Dissenting opinion, Cothran, J	30	36
Petition for appeal and supersedeas	32	38
Order allowing appeal and supersedeas	34	39
Assignments of error	36	40
Notice of appeal	42	44
Bond on appeal (omitted in printing)	44	
Citation and service (omitted in printing)	46	
Præcipe for transcript of record	48	45
Clerk's certificate (omitted in printing)	55	
Statement of points to be relied upon and designation of parts of record to be printed	56	46

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The State of South Carolina
In The Supreme Court

IN THE ORIGINAL JURISDICTION

GREGG DYEING COMPANY, Plaintiff and Petitioner,

against

W. G. QUERY, J. P. DERHAM, and F. C. ROBINSON, members of and constituting South Carolina Tax Commission, Defendants and Respondents.

TRANSCRIPT OF RECORD

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
L. W. PERRIN,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.
JOHN M. DANIEL,
Attorney General
J. FRASER LYON,
Defendants' Attorneys.

PETITION AND COMPLAINT FOR INJUNCTION

The plaintiff and petitioner (hereinafter referred to as the plaintiff) complaining of the defendants and respondents (hereinafter referred to as the defendants) respectfully shows to the Court:

1. That the plaintiff is a corporation of the State of South Carolina, having its principal place of business in Aiken County, in said State, and possesses amongst other rights that of suing and being sued. 1

2. That W. G. Query, J. P. Derham and F. C. Robinson are the members and constitute the South Carolina Tax Commission of the State of South Carolina, duly constituted by and under the Statute laws of said State; it having general charge of tax propositions within the State, and having such powers as are given by the Statutes of said State. That said board maintains its offices at the the seat of government, in Columbia, South Carolina, and transacts its business throughout the whole of the State of South Carolina. 2

3. That as its principal business the plaintiff conducts at the present time, and has for many years past conducted, a bleachery in Aiken County, South Carolina, in which it has for many years and at the present time does, in its process of work and manufacture as a bleachery, use in the preparation and manufacture of its goods much gasoline. That for a number of years, and at the present time, it has been and is the practice of said plaintiff to buy said gasoline in bulk from persons residing or doing business in one of the sister states of the State of South Carolina, and of having said gasoline shipped 3 4

into the State of South Carolina in bulk, said gasoline in said large quantities being brought in as an interstate shipment from said sister state in which said dealer furnishing the same resides or has his place of business. That the gasoline so shipped in in bulk is definitely purchased by this plaintiff from said dealer before it leaves its point of shipment in said sister state, and that said gasoline when it reaches the plant of this plaintiff is unloaded and stored and is kept in storage for more than twenty-four hours in the tanks of this plaintiff in Aiken County, South Carolina, until it is needed for use by this plaintiff, and is in its entirety used by this plaintiff in the manufacture and preparation of its goods and in its general activities, and is not brought into the state for the purpose of resale and is in fact not resold to any person whomsever, but is brought into the state and stored with the intention to, and with the purpose of, and is in reality used by the plaintiff itself for its own purposes alone.

4. That it is a fact that one of the large producers of gasoline, namely, the Standard Oil Company, maintains within the State of South Carolina and within Charleston County, as this plaintiff is informed and believes and as in common knowledge, a large so-called refinery in which gasoline is actually manufactured from crude oil, said crude oil being brought into the State in its crude and unmanufactured form, from which, within this State, gasoline is manufactured and produced in said County of Charleston. But it is a fact that this plaintiff for many years past and at the present time has not been purchasing and using gasoline so produced within the State of South Carolina; but to the contrary, has found it advisable to, and has been and is in the manner herein-

before set out, purchasing its gasoline from dealers residing beyond the State of South Carolina, and after said gasoline has been so purchased has been having said gasoline shipped in Interstate Commerce and as in Interstate shipment from the sister state in which said dealer resides and does business, to this plaintiff's plant and factory in Aiken County. 9

5. That the practice above set out has been followed for many years, this plaintiff is informed and believes, by many other bleacheries and many other large users of gasoline residing and doing business within the State of South Carolina, and that this action is brought by the plaintiff not only for itself but that this plaintiff is suing and maintaining said action on behalf of itself and others in like plight who may come in and be liable for the costs and disbursements of this action. 10

6. That prior to the session of the General Assembly of the State of South Carolina of the year 1930, no effort had been made by the defendants to assess or levy taxes upon the bringing in and use by this plaintiff, and others in like plight with this plaintff, of gasolne purchased from parties without the State of South Carolina, where said gasoline was shipped in as Interstate shipment, and the South Carolina Tax Commission has specifically ruled that no tax was assessable against said gasoline. 11

That at the session of the Legislature of the State of South Carolina for the year 1930, an Act was passed entitled: 12

> "An Act to Impose a License Tax on Gasoline, Substitutes therefor, or Combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a License

Tax under any other Statute of the State of South Carolina, and Providing for the Collection and Distribution of such Tax."

That said Act was approved by the Governor on the 4th day of April, 1930, and is hereinafter referred to as
13 "The Gasoline Tax Act of 1930."

That this plaintiff alleges that on July 7th, 1930, it bought a truck load of two hundred gallons of gasoline from and through a salesman in South Carolina of The Texas Company, a dealer in gasoline having a sales depot in Augusta, in the State of Georgia. That after said purchase had been definitely made said dealer in Augusta,
14 Georgia, shipped and transported said lot of two hundred gallons of gasoline from Augusta, in the State of Georgia, to this plaintiff in Graniteville, in the State of South Carolina, on July 9th, 1930, and said lot of gasoline was there unloaded by this plaintiff and stored in its tanks at its plant in Aiken County, South Carolina, for a period of more than twenty-four hours, with the in-
15 tention on the part of plaintiff when the exigencies of its business made the same necessary and desirable, to use and consume said gasoline in its own business. That said gasoline has not been taxed under Act No. 34 of the Acts of 1925, or Act No. 103 of the Acts of 1929, of the State of South Carolina. That this plaintiff has reported the bringing in and storage of this lot of gasoline
16 to the South Carolina Tax Commission, and has reported that the same consisted of two hundred gallons, and the South Carolina Tax Commission has assessed a tax of six cents per gallon (less allowance for evaporation) amounting to Eleven and 88/100 ($11.88) Dollars thereupon, and has ordered this plaintiff to pay said tax. That this plaintiff has refused to pay said tax, regarding the

same as unlawful and improper, and regarding the Statute upon which it is based as being inapplicable to the course of dealing of the plaintiff herein, and regarding said Statute as being unconstitutional and as being repugnant both to the Constitution of the State of South Carolina and to the Constitution of the United States of America. That upon its refusal to pay said tax the defendant has notified this plaintiff, and has threatened that it will proceed to issue a warrant or execution to the sheriff of Aiken County, or the tax collector thereof, and to collect the same by the seizure and sale of plaintiff's property, and that it claims that said tax constitutes a first lien upon all the property of this plaintiff. 17

That it is the intention of this plaintiff, and as it is informed and believes of other bleacheries in this State, to continue to purchase gasoline for its own use in its manufacturing processes, in Interstate Commerce, and for shipment from sister States in this State. That the purchase of this gasoline alone in bulk lots will within a year amount to approximately thirty-five thousand gallons, all of which will be purchased outright before its shipment and will be shipped from Georgia, Texas and other sister States into South Carolina. 18 19

7. That this plaintiff alleges and charges that the tax levied by the aforesaid Gasoline Tax Act of 1930 is inapplicable to the specific lot of gasoline herein referred to, and is inapplicable to the plaintiff's course of dealing generally as to its gasoline, for the reason that said Act in its sixth section provides: 20

> "Nor shall this Act be construed as applying in the the case of Interstate Commerce."

For, this plaintiff alleges, the lot of gasoline in question was brought in absolutely and directly in Interstate Commerce as the same is defined by the Courts, and that the levying of a tax upon the importation, and upon its storage, and upon plaintiff's course of action generally in bringing other lots of gasoline into this State, will be ap-
21 plying said tax to a "case of Interstate Commerce;" and this plaintiff alleges that a proper construction of said Statute must lead to the holding by the Court that no taxes can be assessed or levied upon the importation of the car load of gasoline referred to.

8. Should the Act in question, however, be construed
22 as being applicable to the lot of gasoline in question and the general course of dealing of this plaintiff and of others in like plight with it, then this plaintiff alleges that said Act levies and assesses a property tax, and not a license tax, and that what is taxes is plaintiff's bringing into the State as an Interstate shipment, property, which it has purchased, and storing its own property for twenty four hours with intent to use it. No act for which a
23 license tax may be levied is involved in so doing. Said act then assesses, this plaintiff alleges, a property tax of six cents a gallon on gasoline which cost plaintiff twelve and one-half cents a gallon, or a property tax of forty-eight per cent., whereas the property tax in the place in Aiken County where said gasoline was in storage was but forty
24 seven mills on the dollar. Hence, this plaintiff alleges, that said Gasoline Tax Act of 1930 is unconstitutional, null and void, and is repugnant to Section 1, Article 10 of the Constitution of South Carolina, in that as applied to the gasoline in question and the course of dealing in question it does not provide for a uniform and equal rate of assessment and taxation. And this plaintiff alleges that the said

tax is in violation of the provisions of said Section 1, Article 10 of the Constitution of the State of South Carolina, in that it does not provide for a uniform and equal rate of assessment and taxation, in that it permits gasoline to be imported and used without taxation, provided the same can be used within twenty-four hours after such shipment loses its Interstate character, and that it is likewise discrimatory, in that it exempts from the operation thereof gasoline which is imported and stored for resale. 25

9. If the Gasoline Tax Act of 1930 is to be considered a license tax, then plaintiff alleges that it is unconstitutional, null and void, and is repugnant to Section 1, Article 10 of the Constitution of the State of South Carolina which permits a graduated license tax on occupations and businesses only, and to the Commerce Clause of the Federal Constitution (Article 1, Section 8, Clause 3) for the reason that the thing taxed and burdened by said Act is the bringing of gasoline, bought and owned by the plaintiff, into the State in Interstate Commerce, and simply storing it as plaintiff's property in this State and not the following of an occupation nor the doing of a business. 26 27

10. That as applied to the lot of gasoline in question which was actually bought by the plaintiff before its shipment from a sister state and which was not shipped for resale but for storage and consumption by its owner, and which has not been resold, and it not for resale, and as applied to a similar course of dealing as to other lots of gasoline this plaintiff alleges that the Gasoline Tax Act of 1930 is unconstitutional, null and void, and is repugnant to the aforesaid Commerce Clause of the Federal Constitution in that goods bought before Interstate ship- 28

ment and which are actually shipped into a state in Interstate Commerce are not subject to a license tax until their owner performs some act as to them which would subject them to loss of their Interstate character, and subject them to a local tax.

29 11. That said Statute as applied to the taxation of the lot of gasoline referred to hereinbefore, and to said method of procedure generally herein described, is unconstitutional, null and void, and is repugnant to the Commerce Clause of the Federal Constitution, to wit: Article 1, Section 8, Clause 3 thereof, and constitutes a burden upon Interstate Commerce; and likewise is repug-
30 nant to the Fourteenth Amendment of the Federal Constitution in that the interstate origin of the gasoline taxed by said Act is made the basis of the classification of the gasoline reached and taxed by said Act, no gasoline produced within the State of South Carolina, or originating in any fashion whatsoever except through an interstate importation being taxed in the hands of the owner, the purchaser, or the prospective consumer, by said Act. This
31 plaintiff alleges that inasmuch as said Act assumes to classify and single out for taxation after it has been imported and stored for twenty-four hours, only gasoline that has been brought and imported from points beyond the State of South Caarolina, that it creates a burden upon Interstate Commerce (upon which subject Congress
32 has legislated) and renders the Statute repugnant to the Commerce Clause of said Constitution, and that as said Act assumes to place a tax upon property brought in from other states and originating as a product of other states, and as a result thereof to force the payment of a tax thereupon on account of its origin beyond the State of South Carolina, and because it is a product of another state, that such Statute is repugnant to the Fourteenth

Amendment of the Federal Constitution, thereby denying to persons within its jurisdiction dealing in the same the equal protection of the laws.

12. That plaintiff alleges that if the Gasoline Tax Act of 1930 is to be considered as levying and assessing a license tax, it is unconstitutional, null and void; and repugnant to the aforesaid Commerce Clause of the Constitution of the United States in that, considered most favorably in favor of its validity, it places a license tax upon the joint acts of importation of gasoline in interstate commerce and storage within this state with intent to consume, which burdens Interstate Commerce certainly as to the importation; and this plaintiff alleges that as license taxes are, under the law, inseparable and must stand or fall as a whole, that the whole Act is unconstitutional. 33 34

13. That this plaintiff alleges that it has no complete or adequate remedy at law, and that its only remedy is an injunction against the defendants restraining them from proceeding to attempt to collect the tax in question, for the following reasons: 35

(a) That the Act in question provides no method whatsoever by which the plaintiff may pay said tax under protest and recover the same from the defendants or from the Treasurer of the State of South Carolina in an action brought for its recovery, should the Courts in any fashion determine that the Statute in question was neither applicable to the car load of gasoline in question nor constitutional. The State has not consented to be sued in that regard. 36

(b) That the Act in question makes the tax in question a first lien upon all of the property of this plaintiff.

That this plaintiff owns much and valuable property in Aiken County, South Carolina. That the defendants under said Act are given authority to issue execution against the property of this plaintiff and to have the same seized and sold under execution, and that said proceeding places a cloud upon the title of the plaintiff's property, both
37 real and personal.

(c) That it is the intention of this plaintiff to continue to buy and import under the mode of procedure herein set out, gasoline into this State from sister States in Interstate Commerce, and that each importation under the terms of the Act is made the subject of the assess-
38 ment of a tax which would follow upon this plaintiff refusing to pay the same, with fresh issuance of executions and sale of plaintiff's property, thereby exposing this plaintiff to a multiplicity of law suits and much vexation.

That for the reasons stated irreparable injury, loss, anxiety, and vexation through the absence of a plain and
39 adequate remedy at law and through the threatened multiplicity of suits and proceedings, is threatened and is about to be visited upon this plaintiff, and for all of such reasons this plaintiff is entitled to injunctive relief, and that all parties in like plight are entitled to the benefit thereof.

40 That a public question is involved, the members of a public board as such are sued, hence the matter herein involved is a matter for cognizance by the Supreme Court in its original jurisdiction.

Wherefore, this plaintiff prays that the judgment of the Court in its original jurisdiction do issue:

(1) Determining the Gasoline Tax Act of 1930 to be inapplicable, specifically to the lot of gasoline referred to herein, and to the course of action generally of this plaintiff and of all others in like plight with it, in bringing in car loads of gasoline in Interstate shipment into this state and in storing the same after such importation. 41

(2) That it said Statute be found to be applicable to the subject matter hereof that said Statute be declared to be unconstitutional, null and void, and to be repugnant in the particulars hereinbefore set out, both to the Constitution of the United States and to the Constition of the State of South Carolina.

(3) That the defendants, and all of their agents, employees and attorneys, be perpetually enjoined from doing any acts whatsoever in connection with or looking to the collection of the tax assessed as a result of the importation and storage of the lot of gasoline in question, and as to any and all other lots of gasoline that may be purchased in like manner by this plaintiff for shipment from sister states, and against proceeding in a like manner against other persons or corporations in like plight, and pursuing a like course as is done by this plaintiff; and that *pendente lite* a rule to show cause and to temporary injunction be issued against the defendants, their agents, employees, and attorneys. 42 43

(4) And for such other and further relief as may be the Court seem meet and proper, and for the costs and disbursements of this action. 44

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
PERRIN & TINSLEY,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.

STATE OF SOUTH CAROLINA,
COUNTY OF AIKEN

Personally appeared before me S. H. SWINT, who being first duly sworn, says: That he is the Treasurer of the GREGG DYEING COMPANY, plaintiff herein, it
45 being a corporation duly chartered and existing under the laws of the State of South Carolina.

That he has read the foregoing complaint and the same is true of his own knwledge, except as to the matters therein stated to be made upon information and belief, and as to such matters he believes it to be true.

S.W.SWINT,

46 Sworn to before me this
11th day of July, 1930.
BELLE DURDEN (Seal)
Notary Public for South Carolina.

STATEMENT

Attached to the foregoing verified complaint was the
47 usual summons directed to the defendants. All of said defendants accepted service of copies of said summons and the foregoing verified complaint, and of the rule to show cause which is next set out, which said rule to show cause was signed by the Hon. Thomas P. Cothran, Associate Justice of the Supreme Court of South Carolina,
48 on the 12th day of July, 1930.

RULE TO SHOW CAUSE

Upon considering the verified petition of the plaintiff herein, and it appearing to the Court that public interests are involved in this proceeding, and that this case

should be determined by the Court in its original jurisdiction,

It is ordered,

That W. G. Query, J. P. Derham and F. C. Robinson, members of and constituting South Carolina Tax Commission, in open Court at Columbia, South Carolina, on 49
the first day of the term next after the expiration of the time fixed in the summons, at ten o'clock A. M., or as soon thereafter as suits the convenience of the Court for the hearing of the issues in this proceeding, do show cause before the Supreme Court of South Carolina, if any they can, why the prayer of the complaint should not be granted, and why the defendants, W. G. Query, J. P. 50
Derham and F. C. Robinson, members of and constituting South Carolina Tax Commission should not be enjoined from carrying out the provisions of an Act entitled, "An Act to impose a License Tax on Gasoline, Substitutes therefor, or Combinations thereof, Kept, Stored, or used in the State of South Carolina, Which Have Not Been Subjected to the Payment of a License Tax Under Any 51
Other Statute of the State of South Carolina, and Providing for the Collection and Distribution of Such Tax," which said Act was approved by the Governor of the State of South Carolina on the fourth day of April, 1930, and that they shall show warrant, if any they can, for executing the provisions of said Act under the Constitution and laws of the State of South Carolina. That, in 52
the meantime, the defendants be, and are hereby restrained from enforcing said Act.

It is further ordered that a copy of the summons and complaint, and Rule to Show Cause, be forwith served on the defendants, and that a copy of the return be served upon the attorneys of the plaintiff herein, within the

time fixed in the summons in this cause for making answer to the complaint.

Let the plaintiff in the meanwhile report to the Tax Commission all gasoline bought by it hereafter in order that the tax may be assessed should the same be de-
53 clared legal by the Court.

T. P. COTHRAN,
Associate Justice.

July 12, 1930.

Within the time allowed for pleading, the defendants interposed and served on the plaintiff the following notice
54 and demurrer:

NOTICE AND DEMURRER

To Messrs. Hendersons & Salley, Haynsworth & Haynsworth, Perrin & Tinsley and Bomar & Osborne, Plaintiff's Attorneys:

You will please take notice, that upon the call of this
55 case for trial, defendants will interpose the following demurrer to the complaint:

The defendants above named demur to the complaint herein upon the ground that it fails to state facts sufficient to constitute a cause of action.

56 In that it appears that the taxes sought to be collected by defendants in the discharge of their official duties are imposed by the terms of an Act approved April 4th, 1930, and that no part of said Act violates the clauses

of the Constitution of the United States, nor of the State of South Carolina, as alleged in the complaint.

JOHN M. DANIEL,
Attorney General.
J. FRASER LYON,
General Counsel for Defendant. 57

I hereby certify that the above demurrer is meritorious and not interposed merely for delay.

J. FRASER LYON,

AGREEMENT AND STIPULATION OF COUNSEL

It is agreed and stipulated by counsel for the plaintiff and by counsel for the defendants that the Supreme 58
Court of South Carolina be, and it is, hereby requested and authorized upon its determination of the demurrer which has been interposed herein, and in accordance with its determination of said demurrer, to render final judgment in this cause, it being stipulated and admitted by both the plaintiff and the defendants herein that the allegations of the complaint are true and correct, and 59
that, therefore, the determination of the facts underlying and surrounding the case in any other form whatsoever is unnecessary.

It is further stipulated and agreed, however, that in addition to the facts stated in the complaint, that the Court in determining the demurrer, and also in render- 60
ing final judgment be requested, and is hereby authorized to consider the additional fact by that:

Since the bringing of this action the plaintiff has purchased from a dealer in Louisana a full carload of gasoline, which purchase was consummated before said carload of gasoline was shipped, and that said carload

of gasoline was shipped through Louisiana, through the States of Mississippi, Alabama, and Georgia, and into the State of South Carolina in Interstate Commerce. That it was unloaded by the plaintiff at Graniteville, South Carolina, and was there stored for more than twenty-four hours to be used for its manufacturing pur-
61 poses, and that said fact has been reported to the South Carolina Tax Commission. That said car contained 80,011 gallons, and that the tax thereon at six cents a gallon would be $480.66.

That it is further stipulated that a printed copy of the so-called *Gasoline Tax Act of* 1930 approved April 4,
62 1930, be incorporated and be bound in the record herein.

We consent:

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
L. W. PERRIN,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.

63 JOHN M. DANIEL,
Attorney General.
J. FRASER LYON,
Defendants' Attorneys.

64

AGREEMENT

We, the undersigned, counsel for the plaintiff and petitioner herein, and counsel for the defendants and respondents herein, do agree and stipulate that the foregoing, together with a copy of the printed Act referred to hereinbefore, shall constitute the record for the hearing and consideration of the foregoing matter by the Supreme Court of South Carolina in its original jurisdiction.

65

HAYNSWORTH & HAYNSWORTH,
BOMAR & OSBORNE,
L. W. PERRIN,
HENDERSONS & SALLEY,
Plaintiff's Attorneys.

66

J. FRASER LYON,
Defendants' Attorneys.

67

68

[fol. 19]

IN SUPREME COURT OF SOUTH CAROLINA

Case No. 919

GREGG DYEING COMPANY, Petitioner,

v.

W. G. QUERY, J. P. DERHAM and F. C. ROBINSON, Members of and Constituting South Carolina Tax Commission, Respondents

In the Original Jurisdiction

Petition Denied

Hendersons & Salley, of Aiken, Bomar & Osborne, and Perrin & Tinsley, all of Spartanburg, and Haynsworth & Haynsworth, of Greenville, for petitioner.

J. Fraser Lyon, and John M. Daniel, Attorney General, both of Columbia, for respondents.

OPINION AND JUDGMENT—Filed April 13, 1931

COSGROVE, A. A. J.:

In the original jurisdiction of the Court, petitioner has brought this action seeking to enjoin respondents as members of the South Carolina Tax Commission from the enforcement as to it, and others in like plight, of the provisions of a statute which it denominates as the "Gasoline Tax Act of 1930".

The Act in question, approved April 4th, 1930, is entitled: "An Act to impose a license tax on gasoline, substitutes therefore, or combinations thereof, kept, stored or used in the State of South Carolina, which have not been subjected to the payment of a license tax under any other statute of the State of South Carolina and providing for the collection and distribution of such tax."

Section I provides:

"Any person, firm, corporation, municipality, county, or any subdivision thereof, in the State of South Carolina which shall import into this State from any other State or

foreign country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, etc. aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment in interstate commerce, be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, etc. and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by Acts of the General Assembly of the [fol. 20] State of South Carolina", designating particularly the Acts of 1925 and 1929 imposing license taxes for the privilege of "dealing in gasoline or like products of petroleum, as therein defined.

Section 6 provides:

"Nothing within this Act shall be construed to impose a license tax upon any selling agent, consumer, or retailer, selling, consigning, shipping, distributing or using gasoline, combinations thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce."

In substance, petitioner alleges that it conducts a bleachery in Aiken County, South Carolina, and in the process of its work and manufacture uses much gasoline; that at present and for a number of years heretofore it has been its practice to buy its gasoline in bulk from persons residing or doing business without the State of South Carolina; that such gasoline is purchased outright at the place of business of the out-of-state dealer, and the product so pur-

chased is shipped in interstate commerce to its plant, where, upon arrival, it is unloaded and stored and kept in storage in its own tanks for more than twenty-four hours, until needed for use in its manufacturing processes and for its own purposes alone; that though there is at Charleston, South Carolina, a refinery conducted by the Standard Oil Company, at which large quantities of gasoline are produced, it has not in the past or present purchased such gasoline, but "has found it advisable" to purchase its gasoline from dealers beyond the State of South Carolina in the manner above outlined. That this practice is followed not alone by petitioner but also by other large users of gasoline in South Carolina in like plight. That it is its intention to continue the purchase of gasoline for its own use in its manufacturing processes as above stated, its annual purchases in bulk from without the State of South Carolina being estimated at approximately thirty-five thousand gallons.

This Court is asked to declare the Act of 1930 inapplicable to plaintiff and others in like plight upon the facts alleged: and, that, if found applicable, the same be declared unconstitutional under both the State and Federal Constitutions in the particulars set forth.

To the petition herein the Attorney General, on behalf of Respondents, filed a general demurrer to the effect that "no part of said Act violates the clauses of the Constitution of the United States, nor of the State of South Carolina, as alleged in the Complaint."

The following questions are presented:

First. Under the Federal Constitution,

(a) The act burdens Interstate Commerce.

(b) The Act discriminates against gasoline produced in other States.

(c) The Act taxes two things: (1) Interstate importation, (2) Storage with- the State; that these two essentials are inseparable for the purposes of the tax and hence Act discriminatory and burden on Interstate Commerce.

Second. Under the State Constitution,

[fol. 21] (a) The tax is a property tax repugnant to Section 1 Article X, of the Constitution.

(b) The tax is not an excise tax but is a license tax within the constitutional definition, applying only to "occupations and businesses", and as to petitioner contravenes this constitutional provision.

The Act in question may be said to be complementary to the other statutes of South Carolina under which are assessed a gallonage tax on gasoline and other petroleum products. Indeed, it expressly excludes from its provisions all gasoline upon which a like tax has been paid under other statutes. It so declares in its title and specifically designates in its body the statutes, payment of the tax under which exempts from its burden.

It is a settled rule of statutory construction that it is the duty of the Court to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations. When a Statute is a part of other legislation, designed as a whole to establish an expressed state policy, the Court should strive to effectuate that policy. To aid in its construction, the statute must be read in the light of cognate legislation. Tallevast v. Kaminski, 146 S. C. 225, and, in construing statutes on the same subject, "they shall be taken together and construed in pari materia even though there be no express reference by the latter statute to the former." State v. Fields, 2 Bailey, 554; 25 R. C. L. p. 1060.

See also, Columbia Gas Light Co. v. Mobley, 139 S. C. 113.

"The rule that statutes in pari materia should be construed together applies with peculiar force to statutes that are contemporaneous." 25 R. C. L. p. 1062.

This Court has said:

"There is no rule better supported by justice and wisdom than that, when there are several statutes on the same subject, they should be read together as *one act*, so far as their provisions are consistent; as by this means, the mischief, the remedy, and the intention, of the legislature, are more distinctly seen and applied." (Emphasis ours.)

Richards v. McDaniel, 2 Mill Const. Rep. p. 18.

While, as a general rule, reference to statutes in pari materia for purposes of construction has been made largely

where there is ambiguity in the language of the statute construed, yet this principle has not been limited solely to such instances.

"Statutes in para materia must be construed together and given a construction, if possible, which violates no constitutional provision." (Syllabus.)

Neil v. Independent Realty Co. (Mo.) 70 A. L. R. 550.

Again:

"The two acts are cognate parts of a single purpose the liquidation and retirement of designated road and bridge bonds—in the accomplishment of which purpose the provisions of the two acts are inextricably inter-related. They should, therefore, be construed in *para materia* as one en-[fol. 22] actment." (Emphasis ours.)

Amos v. Matthews (Fla.) 126 So. 313.

In South Carolina, commencing about a decade ago, the General Assembly expressed its public policy as to revenue to be derived from the use of gasoline Vol. 32 Stat. at Large, p. 835. The tax then imposed was two cents a gallon. In 1925, the tax was increased to five cents, and in 1929, to six cents on the gallon. These Statutes, however, only reached "dealers" in this commodity.

They provided:

"That every oil company, person, firm or corporation doing domestic or intra state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business, shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitutes therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State." Acts, 1929, p. 107.

Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown.

Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in Gasoline in quantities from without the State, and storing it for their own purposes, the Legislature in 1930 enacted the statute under consideration, applying the six cents tax to every person, firm, corporation, municipality or any subdivision subject to its terms. The mischief and evil aimed at are apparent.

Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of six cents per gallon, no matter what the origin of, or state in which, the gasoline is produced.

Petitioner frankly states that it is to its advantage to buy its gasoline in other states than South Carolina, and to use, consume and enjoy the same to its profit without paying to the State of South Carolina the tax required of all others.

It attempts to defend its position on the ground that the Act of 1930 is unconstitutional, null and void and asks this Court so to declare.

At the outset there are certain cardinal principles to be observed.

A Court will not declare an Act of the Legislature unconstitutional unless the same appears beyond a reasonable doubt.

"To doubt the constitutionality of a law is to resolve the doubt in favor of its validity." 6 R. C. L. 76.

In determining its constitutionality, "every presumption is to be indulged in favor of the validity of the Statute." Graves v. Minnesota—272 U. S. 425; 71 L. Ed. 331.

[fol. 23] Under settled practice, a preference is always given to the construction of a statute upholding its constitutionality where it is fairly susceptible of two constructions. Missouri P. R. Co. v. Boone, 270 U. S. 446; 70 L. Ed. 688.

On more than one occasion this Court has said:

"It is a grave matter to declare a solemn enactment of the Legislature, a co-ordinate branch of the government, invalid, and that the Court in its deliberations and conclusions should be guided by the well settled principle that the unconstitutionality of an Act must be shown beyond a

reasonable doubt." Wingfield v. S. C. Tax Commission, 147 S. C. 122 and cases cited.

Santee Mills v. Query, 122 S. C. 162.

In the light of these principles and the history of this legislation we shall now consider the objections to the Act raised by petitioner.

In our research we have found two cases from the Appellate Courts of sister states, in which statutes of like import were considered and upheld, against objections in every way the same as those here presented. Sheip v. Amos (Fla.), 130 So. 699; Foster & Creighton Co. v. Graham (Tenn.), 285 S. W. 570, 47 A. L. R. 971. The South Carolina Act, we were told in the argument before us, is substantially a duplicate of the Florida statute upheld in the Sheip case.

We might be content, therefore, to rest our decision on these authorities and sustain this Act, with nothing more. We think, however, that the importance of the questions presented and the asserted difference of our state constitutional provisions warrant a full and fair consideration and determination of the issues.

The Federal Questions

1. Does this Statute burden Interstate Commerce within the meaning of the Federal decisions?

Under the facts alleged, petitioner purchases at a point without the State of South Carolina its gasoline in tank car lots on some occasions and on others in large drums. At any rate, the gasoline is delivered at its plant in Aiken County in these "original packages", and upon delivery it is transferred from the "original packages" to its own tanks and stored for future use.

On its face, the Act expressly negatives an intention to tax interstate commerce. It does not purpose to tax any gasoline until twenty-four hours after it has lost its interstate. character. It seeks to operate only after the commodity has been severed from its interstate character and has become at rest as a part of the general mass of property in this State subject to the protection of its laws. Its immunity from State taxation is then at an end.

"The beginning and end of the transit which constitutes interstate commerce are easy to mark. The first is defined in Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be, in Brown v. Houston, 114 U. S. 622, 69 L. Ed. 257, 5 Sup. Ct. Rep. 1091, the point of time at which it arrives at destination."

[fol. 24] General Oil Co. v. Crain, 209 U. S. 229; 52 L. Ed. 764; A. C. L. R. R. Company v. Standard Oil Co., 12 F. (2nd) 541, 60 A. L. R. 1456.

In support of its contention that the tax question, nevertheless, is a burden on Interstate Commerce under its practice as above outlined, petitioner cites,

Standard Oil Co. v. Graves, 249 U. S. 389.
Askren v. Continental Oil Co., 252 U. S. 444.
Bowman v. Oil Co., 256 U. S. 646.
Texas Co. v. Brown, 258 U. S. 470.
Sonneborn Bros. v. Cureton (Keeling), 262 U. S. 513.
Hart Refineries v. Harmon, 278 U. S. 499.

It would serve no useful purpose to review these decisions individually. With the exception of the last, a later case they were all reviewed and considered by the United States Supreme Court in Sonneborn Bros. v. Cureton, supra, in an elaborate opinion by its late distinguished Chief Justice Taft. Speaking for the Court, he said:

"The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to the warerooms or warehouse in Texas, there held for sales in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas."

"Our conclusion must depend on the answer to the question: Is this a regulation of, or burden upon, interstate commerce? We think it is neither. The oil has come to a state of rest in the warehouse of appellants, and had

become a part of their stock, with which they proposed to do business as wholesale dealers in the state. *The interstate transportation was at an end*, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject." (Emphasis ours.)

As to the holdings and language of the cases above cited by petitioner which would indicate that a tax on gasoline brought into a state and sold in original packages of interstate commerce would be a burden on that commerce, the Court said:

"Upon full consideration and after a re-argument, we cannot think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the state to be justified either in reason or on previous authority; and to this extent the opinions in the cases cited are qualified."

It follows, therefore, that if a state may tax the sale of such products free from the inhibition of the commerce clause of the Federal Constitution, a tax upon the storage for use and consumption of like products upon their coming to rest in the state is valid.

[fol. 25] The case of Texas Co. v. Brown, supra, likewise supports this view. In construing the legality of a tax for inspection purposes under a Georgia statute, the Supreme Court said:

"Aside from this, the authority of defendants to tax the products *or their storage* or sale commences when they have come to rest; ordinarily, when transferred from the tank car to the storage tank and added to plaintiff's stock-in-trade kept therein for local distribution and sale". (Emphasis ours.)

In Hart Refineries v. Harmon, supra, decided in 1928, the extent of the Sonneborn decision was construed. After reiterating its conclusions above set forth, the Court said:

"But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the State in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the Federal Constitution is concerned, be exerted in any way which the state's Constitution and laws permit, of course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon *the use* as well as upon the sale of the commodity in domestic trade, without coming in conflict with the commerce clause, was specifically determined in Bowman v. Continental Oil Co. 256 U. S. 642, 648, 65 L. Ed. 1139, 1145, 41 Sup. Ct. Rep. 606". (Italics ours.)

See also

Wright v. Fulton County (Ga.), 150 S. E. 262.
Sheip v. Amos, supra.
Foster & Creighton Co. v. Graham, supra.

Our conclusion, therefore, is that there is nothing in the Act itself or in the manner of its enforcement to give countenance to the assertion that it regulates or burdens Interstate Commerce.

But, says petitioner, conceding these decisions to apply, the Act still is unconstitutional because all gasoline stored in South Carolina is not subject to the tax and hence the Act discriminates against the commodity because of its origin in another state. This brings us to petitioner's remaining objections under the Federal law, II and III. The Act is assailed under these heads because:

(1) It discriminates, it is asserted, against the products of other states because of their origin; and (2) in that, it is argued, it taxes both interstate importation and storage within the state, and as such is discriminatory under the Equal Protection Clause of the Constitution, and, in addition, in the respect set forth, burdens Interstate Commerce. For the sake of brevity we shall discuss these objections together.

It is a settled principle of Federal law that a state cannot, consistently with the Federal Constitution, impose upon the products of other states, brought therein, for sale

or use, more onerous public burdens or taxes than it imposes on like products of its own territory.

Guy v. Baltimore, 100 U. S. 439.
Webber v. Virginia, 103 U. S. 350.
[fol. 26] Darnell v. Memphis, 208 U. S. 113.
Cheney Bros. v. Massachusetts, 246 U. S. 147.
Bethelem Motors Co. v. Flynt, 256 U. S. 421.
Sonneborn Bros. v. Keeling, supra.

However:

"The power of the state to classify for purposes of taxation is of wide range and flecibility, provided that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while exempting another class necessarily result in imposing a greater burden upon the property taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation or one activity from which other and different occupations or activities are exempt, a denial of equal protection. It is enough if all in the same class are included and treated alike."

(Hart Refineries v. Harmon, Supra.)

The tax here imposed is an excise tax and not a property tax. Bowman v. Continental Oil Co. 256 U. S. 642, 65 L. Ed. 1139.

Constitutional requirements, both State and Federal, as to equality and uniformity, are in strictness applicable only to advalorem taxes on property and not to excises. It is sufficient if the excise imposed has a reasonable basis of classification, all in the same class are included and treated alike, be geographically uniform, and does not unreasonably burden interstate commerce.

The public policy of the State of South Carolina, as expressed in this legislation, taking it as a whole, is that all consumers shall pay the gallonage tax of six cents. Under the cognate Acts of 1925 and 1929, while the tax is directly imposed upon the seller, the burden actually rests upon the ultimate consumer.

"That the Legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from

the obviously inevitable result of requiring its payment, ordinarily, by the first domestic seller, but * * * (the tax applies, we interpolate) likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption and use". Texas Company v. Brown, supra; Panhandle Oil Co. v. Miss. 277 U. S. 218, 72 L. Ed. 857.

See, also, Shanks v. Kentucky Ind. Oil Co. (Ky.) 8 S. W. (2nd) 385.

By the Act under consideration, the Legislature proposed to extend the consumption tax on gasoline in South Carolina. It taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed. All Oil Companies in South Carolina, including the Standard Oil Company in Charleston, S. C. are required to pay and do pay the tax upon any gasoline they sell and all that they use in South Carolina, whether it be for operating their trucks upon the highways or otherwise (34 Stat. at Large, p. 197).

The Act of 1930 puts gasoline imported in interstate commerce and thereafter stored to be used and consumed in South Carolina on the same basis, as to taxation, as domestic gasoline, that is, gasoline produced in this state and used and consumed in this state.

[fol. 27] "Apparently" said the Supreme Court of the United States in Texas Co. v. Brown, supra, "it was intended to cover the case of large consumers who might otherwise find it advantageous to bring in, and store until needed, quantities of oil or gasoline sufficient for their own consumption, thus escaping dealers profit and inspection tax as well. We find in its provisions nothing to raise a question about the validity of the system."

The tax applies only to persons who store with intent to use and consume the gasoline in South Carolina. The class sought to be reached by the tax is clear. The tax is single upon the use and consumption in South Carolina of gasoline, whether imported or not. Mere storage after manufacture or production is not enough to provoke the application of the tax. The only kind of storage affected is that with intent to use and consume the product in South Carolina.

Such intention on its part petitioner admits to exist in the instant case, and in all future transactions. The fact that the Standard Oil Company at Charleston, S. C., manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolnia, does not, to our mind, work a discrimination against petitioner or producers in other states, It is admitted that that Company, like all others, is required to pay and does pay a tax of six cents on all of its product sold in South Carolina or used and consumed in its business. The equality and uniformity of the tax is apparent.

That a tax free period of twenty-four hours on all gasoline brought into the State by petitioner and others in like plight is allowed by the Act, cannot, we think, be a ground of complaint on the part of petitioner.

Taking then, these Gasoline Tax Acts as a whole and construing them as one enactment as we must in order to ascertian the intention of the Legislature and to give full force and effect to the expressed public policy of the State to lay a gallonage tax on all gasoline sold, used and consumed in South Carolina, regardless of origin, it is our opinion that these objections to the Act of 1930 under the Federal Constitution cannot be sustained.

But, aside from these considerations, the tax is valid as a reasonable a lawful exercise of the police power of the State in the protection of the welfare and safety of its citizens.

"While passed primarily for revenue purposes, and to forestall the evasion of the sales tax (see Texas Co. v. Brown, 258 U. S. 466, 481; 66 L. Ed. 721, 728) the Statute is also regulatory in effect. The storage of gasoline in large quantities is inimical to public safety. If no financial advantage can be gained by storing it, one of the most substantial inducements to store it is removed. That result is accomplished by imposing a storage tax equivalent to the sales tax, thus tending to curb the practice of storing. See Foster & Creighton v. Graham 285 S. W. 570, 47 A. L. R. 971." Sheip v. Amos, supra.

See also

Railroad Commission v. So. Ry. Co., 127 S. C. 15.
Bowman v. Continental Oil Co., supra.
Texas Co. v. Brown, supra.

The State Questions

1. Is the tax a property tax and hence repugnant to Section 1, Article X, of the Constitution of South Carolina? [fol. 28] This section of the Constitution provides that "the General Assembly shall provide by law for a uniform and equal rate of taxation," etc.

If the tax is a property tax, this section applies; if an excise, it is inapplicable.

A tax of like character has been determined to be an excise tax and not a property tax. Bowman v. Continental Oil Co. supra; O'Berry v. Mecklenburg County (N. C.) 151 S. E. 880.

"An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed strictly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the payer irrespective of the value of the taxpayers' assets, it is regarded as an excise; but if the tax is computed on the valuation of property, and assessed by assessors either where it is situated or at the owners' domicile, although privileges may be included in the valuation, it is considered a property tax." (26 R. C. L. p. 35.)

In a very recent case, the Supreme Court of the United States used this language:

"While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct (Pollock v. Farmers Loan & T. Co. 157 U. S. 429, 39 L. Ed. 759, etc.) this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise." Bromley v. McCaughn, 280 U. S. 124; 74 L. Ed. 226.

The tax under the Act of 1930 is, of course, not assessed against the value of the gasoline stored, used or consumed, for regardless of its market price, the tax remains the same.

Petitioner in support of its claim under this head relies solely on the case of Dawson v. Kentucky Distilleries, 255 U. S. 288, 65 L. Ed. 638. This decision is fully analyzed and considered in the Sheip and Foster & Creighton Co. cases, supra. In each of these cases petitioners attacked like statutes on the ground that the taxes assessed under them were property taxes. The contention was overruled. It would serve only to lengthen this already growing opinion to go over the same ground. We are satisfied with the conclusions reached on this point by those eminent tribunals.

II. Akin to the foregoing objection of petitioner to the Act under the State Constitution is its remaining ground that the tax is a license tax upon the mere storing of one's property, whereas the Constitution allows license taxes only on "occupations and businesses".

As shown above, the tax herein considered is an excise tax. It is not a license tax on an occupation or business. 17 R. C. L. 474, et seq.

The origin of excise taxes we have had neither the time nor the opportunity to explore. It is certain that in the days of Blackstone, they were not only well established but much complained of. An excise on tea gave birth to this nation. The value and power of such a tax was so well recognized at the time of the adoption of the Federal Constitution that the authority to impose excises was expressly in [fol. 29] that instrument delegated to the Federal Government by the States. Many State Constitutions, notably of the older Commonwealths, likewise expressly authorize or restrict the imposition of such taxes in eonomine.

Attempts have been made to define such a tax, but definitions are short lived and must change as new conditions arise to require a new exercise of the power defined.

It has been generally recognized that excises are "taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges". Cooley, Const. Lim. 7th Ed. 680. Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389; Patton v. Brady, 184 U. S. 608, 46 L. Ed. 713; Maine v. Grand Trunk R. Co., 142 U. S. 217; 35 L. Ed. 994.

"If a tax on the use or consumption of gasoline is intrinsically an excise tax, as held by the United States Su-

preme Court, then it is an excise tax everywhere. The Constitution of the State does not affect at all the generic quality of the tax, but merely the right of the State to impose it." Foster & Creighton Co. v. Graham, supra.

In South Carolina, neither the Constitution of 1868 nor 1895 expressly or impliedly makes reference to excise taxes, though their existence must naturally be assumed to have been known to the framers of these instruments. The lack of restriction in them on the inherent power of the Legislature to impose such taxes affords ground for the conclusion that the power was purposely left unrestricted while the mode of exercising other taxing powers was provided for.

As was so well said in State v. Hayne, 4 S. C. 419:

"Where the Constitution undertakes to regulate the exercise of the taxing power, by prescribing the mode by which the revenues of the State shall be raised, in the absence of the expression of a clear intent to exclude other modes of raising revenue than that prescribed, such regulation, while it must be construed as imposing a political duty on the Legislature, cannot be held as circumscribing its constitutional powers so as to exclude a resort to other means of raising revenue where, in its judgment, an exigency exists calling for a resort to such auxiliary means of raising revenue."

See also
Lillard v. Melton, 103 S. C. 16.
Alderman v. Wells, 85 S. C. 507.

"It is elementary, of course, that the power of the Legislature is plenary in the absence of any Constitutional limitation." Walpole v. Wall, 158 S. C. 114; that a State Constitution is not a grant of power but rather a limitation of legislative power, Evans v. Beattie, 137 S. C. 512; and that "the right to tax is not granted by the Constitution". Peoples v. Rearden, 8 L. R. A. (N. S.) 320.

"Except insofar as it is limited by the State and Federal Constitutions, the taxing power of the State is general and absolute and extends to all persons, property and business within its jurisdiction or reach". Santee Mills v. Query (supra).

Hence, there have been heretofore recognized in South Carolina, such excise taxes as those on inheritances, documentary stamps, corporate privileges and franchises, the sale of gasoline, and the like.

[fol. 30] We find no inhibition in our State Constitution and hold that the Legislature has the power to exact this tax.

The contention of petitioner that this tax, even if an excise tax, is invalid because it subjects to taxation the mere right to own, hold and possess property, likewise cannot be sustained. The cases cited in support of this contention were fully considered in Sheip v. Amos, supra, from Florida, and Foster & Creighton Co. v. Graham, supra, from Tennessee, and clearly demonstrated to be inapplicable to the questions presented. With their conclusions we are fully in agreement.

As a protest, rather than an objection to the statute, petitioner finally urges that it is unjust to tax it and others in like plight for gasoline used in the process of manufacture, while other users of gasoline are benefited by the tax imposed through use of the resultant good roads for the construction and maintenance of which the tax is expended. But, any benefit or improvement to the State as a whole must necessarily affect every citizen thereof, directly or indirectly. At any rate, there is nothing in the State or Federal Constitution which requires a State to apply such fees to the benefit of those who pay them. Carey & Hamilton v. Snook, 281 U. S. 66; 74 L. Ed. 704.

We conclude, therefore, that as against the objections raised by petitioner, the Act of 1930 herein considered is valid and Constitutional under both the State and Federal Constitutions.

As Counsel for both parties have stipulated that if the Act be upheld, this Court should render final judgment in the cause, it is

Ordered, adjudged and decreed that the temporary injunction herein is dissolved, the prayer for a permanent injunction denied, the petition dismissed, and that Respondents have judgment against Petitioner in the sum of Four Hundred Ninety-two and 54/100 ($492.54) Dollars, the amount of taxes assessed against the two ship-

ments involved in this cause, pursuant to the terms and provisions of said Act.

And it is so ordered.

Blease, C. J.; Stabler and Carter, JJ., concur. Cothran, J., dissents.

IN SUPREME COURT OF SOUTH CAROLINA

DISSENTING OPINION

COTHRAN, J. (dissenting):

I will assume the correctness of the holding in the opinion of Mr. Justice Cosgrove that the tax provided for in the Act of 1930, is an excise tax and not a license tax upon an occupation or business. As a matter of fact however the title of the Act purports to impose a license tax upon gasoline (how this can be done is inconceivable), while the body of the Act requires the payment of a license tax by the "person, firm, corporation, municipality, County or subdivision thereof", which imports into this State and keeps in storage gasoline intended to be stored or used, of six cents per gallon.

(Attention should also be called to the fact that the tax is sought to be imposed upon importations from a foreign country, which is clearly contrary to the Constitution. But as such an importation is not involved in the present suit, this objection may be waived.)

The Sonneborn case, 262 U. S. 506, draws a distinction between importations from a foreign country and interstate commerce; it abrogates the rule which had been ap- [fol. 31] plied by what is known as the "Original Package" cases, the basis of which was that a sale and delivery after the transportation had been completed was a part of the interstate movement, and declares that an interstate shipment after delivery to and storage by the consignee and subsequently sold and delivered in original package in the State of delivery, may be made the basis of an occupation tax upon the consignee.

Assuming that a delivery to and storage by the consignee, without a sale comes within the same rule, I think that the condition upon which the Sonneborn case was de-

cided, does not exist in the present case. That condition is thus expressed in the Sonneborn case:

"* * * when the state tax applies to all wholesale dealers in oil engaged in making sales and deliveries in Texas. * * * The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject. * * * A state tax upon merchandise brought in from another State or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State."

It is clear from the terms of the Act of 1930 that it applies exclusively to importations "from any other State or foreign country", which constitute, as recognized by the Act, "interstate commerce."

It is alleged in the complaint and admitted by the demurrer, that gasoline is manufactured from the raw product in South Carolina; the Act has no application to it; necessarily a discrimination against interstate commerce. The fact, if it be a fact, that the tax is being collected from such manufacturers in this State does not alter the situation; they are not required under the Act to pay it while in storage.

This I think is sufficient to show the unconstitutionality of the Act in its present form; I am not to be understood as approving or disapproving the conclusions announced in the leading opinion upon other questions involved in the appeal.

[fol. 32] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PETITION FOR APPEAL AND SUPERSEDEAS

To the Honorable Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina:

And now comes Gregg Dyeing Company, the plaintiff and petitioner herein, by P. F. Henderson, Henderson & Salley, Bomar & Osborne, Perrin & Tinsley and Haynesworth & Haynesworth, its attorneys, and feeling aggrieved by the opinion and order of this Court, entered on the 13th day of April, 1931, in so far as the same refused to grant the permanent injunction prayed for in plaintiffs and petitioners complaint herein, and in that said opinion and order granted a final judgment against this plaintiff, and hereby prays that an appeal may be allowed it from said opinion, decree and final order to the Supreme Court of the United States, and that the Clerk of the Supreme Court of South Carolina may be directed to prepare and certify a transcript of the records and proceedings in said cause to the United States Supreme Court at Washington, D. C., in accordance with its rules and practice, and for the reasons specified and set out in the assignment of errors filed herewith, in order that the errors complained of in the said [fol. 33] assignment of errors may be reviewed, and if error be found corrected according to the laws and customs of the United States, and that all further proceedings herein after the allowance of said appeal by transferred to said Supreme Court of the United States of America.

Petitioner further prays that an order of supersedeas may be granted herein pending the final disposition of the cause, and that the amount of the security therefor, and for costs, be fixed by the order allowing this appeal.

Gregg Dyeing Company, by P. F. Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Its Counsel.

[fol. 34] In Supreme Court of South Carolina

[Title omitted]

Order Allowing Appeal and to Operate as Supersedeas

The plaintiff and petitioner herein having prayed for the allowance of an appeal to the Supreme Court of the United States from the decree made and the final judgment entered in said cause by the Supreme Court of the State of South Carolina on the 13th day of April, 1931, in so far as the same refused the issuance of an injunction against the defendants, and in so far as the same granted absolute judgment against the plaintiff, all against the prayer of the plaintiff in its complaint herein, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statute and rules of the Supreme Court of the United States in such cases made and provided, it is now hereby

Ordered

That an appeal be and the same is hereby allowed as prayed for to the Supreme Court of the United States in this cause, and as provided by law; and

It is further ordered that the Clerk of this court shall [fol. 35] prepare and certify a transcript of its record and proceeding, and decree and final order, in accordance with the statutes and rules of the Supreme Court of the United States, and transmit the same to the Clerk of the Supreme Court of the United States at Washington, D. C., so that he shall have the same in said Court within thirty days from this date; and

It is further ordered that this order operate as a supersedeas, and that the supersedeas bond be and the same is fixed in the sum of One Thousand Dollars ($1000.00); and

It is further ordered that the security for costs be and the same is hereby fixed in the sum of Two Hundred and fifty dollars ($250.00).

Let said bond, which may be combined in the sum of Twelve Hundred and fifty dollars ($1250.00), be approved by the Clerk of this Court.

Eugene S. Blease, Chief Justice of Supreme Court of South Carolina.

June 11, 1931.

[fol. 36] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Gregg Dyeing Company, the Plaintiff and petitioner herein, through its counsel and presents this assignment of errors, and says that in the records and proceedings in the above entitled cause and the resultant decree and opinion of the Supreme Court of South Carolina made and entered against it on the 13th day of April, 1931, there is error in the particulars herein set out; that is to say:

1

That the Court erred in making the decree herein.

2

That the Court erred in holding that the Act of the General Assembly of the State of South Carolina approved April 4, 1930 (Acts of 1930, page 1390) hereinafter referred to as "The Gasoline Tax Act of 1930," is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution (Article 1, Section 8, Clause 3); and that the Court erred in not holding to the contrary, that the aforesaid Act is unconstitutional and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes the interstate origin of the gasoline in question [fol. 37] the basis of classification in the imposition of the tax.

3

That the Court erred in holding that the aforesaid Gasoline Tax Act of 1930 passed as aforesaid by the General Assembly of the State of South Carolina, is constitutional and is not repugnant to the Commerce Clause of the Federal Constitution; and that the Court erred in not holding to the contrary, that said Act is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, inasmuch as it levies a tax on gasoline bought outright by plaintiff before its shipment in Interstate Commerce and not thereafter resold within this State.

4

That the Court erred in holding that the socalled Gasoline Tax Act of 1930 enacted as aforesaid by the General Assembly of South Carolina, is not a license tax Act.

5

That the Court erred in not holding that the Act in question is a License Tax Act, and that as a License Tax Act it is unconstitutional and is repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline within the State of South Carolina and its importation in Interstate Commerce the joint acts which give rise to the license tax imposed; and that the Court further erred in not holding that a license tax cannot be laid in part upon Interstate Commerce.

6

That the Court erred in not holding that the aforesaid Gasoline Tax Act of 1930, enacted as aforesaid by the Gen- [fol. 38] eral Assembly of the State of South Carolina, is repugnant to both the Commerce Clause of the Federal Constitution and to the equal protection Clause of the Fourteenth Amendment to the Federal Constitution, in that it discriminates against gasoline produced by other States, and places the taxes levied only upon persons who and corporations which import in Interstate Commerce gasoline and store the same for twenty-four hours, it appearing affirmatively amongst other things that gasoline is produced and manufactured within the State of South Carolina, which said gasoline manufactured and produced within the State of South Carolina and stored for future use and consumption in South Carolina is exempt from the tax imposed under the said Gasoline Tax Act of 1930.

7

That the Court erred in not holding that under the undisputed facts of this case, plaintiff was entitled to an injunction against the imposition and enforcement of the threatened tax, there being no adequate remedy at law, and the admitted facts showing that the respondents were threatening to tax gasoline which had been definitely bought in a

sister State before its shipment and was not destined for resale, that such gasoline was a produc- of a sister state, and that such origin was made the basis of the classification for the purposes of such taxation.

8

That the Court erred in holding that in considering the constitutionality of the Act in question, that other Acts of the General Assembly of said State may be considered in so doing, and that said other acts may supplement and com- [fol. 39] plement the Constitutionality of the Act in question, it being submitted to the contrary that the Act in question must stand or fall as to its constitutionality upon its own terms, and that certainly no other Act which is not included within its terms may be read into said Act for the purpose of testing its constitutionality.

9

That the Court erred in holding that the general policy of the State of South Carolina as to the taxation of gasoline as a whole may be considered in testing the constitutionality of the Act in question, and that the fact that there is another Act or Acts which places a tax of six cents per gallon upon all persons, firms or corporations engaging in the business of selling gasoline may be invoked in testing the constitutionality of the present Act, which does not purport to tax sales but which attempts to tax importation in Interstate Commerce and storage alone.

10

That the Court erred in holding that the other Acts referred to in the Acts in question, to-wit: The Act of 1925, and the Act of 1929, purport to place a tax upon gasoline merely used within the State of South Carolina, and that the Standard Oil Company is legally forced and required to pay a gasoline tax within the State of South Carolina upon gasoline used by it in its fleet of trucks in said State; and that the payment of a uniform gasoline tax of six cents per gallon is by statute passed on to all users of gasoline within the State of South Carolina.

[fol. 40] —

That the Court erred in holding that the Acts of the State of South Carolina, taken as a whole, reach and tax all gas-

oline consumed in the State, it being submitted that the Act in question expressly leaves free of taxation gasoline used within twenty-four hours after its importation, which may be a considerable quantity, and that the Acts of 1925 and 1929 do not legally impose a tax on gasoline produced and used but not sold, in South Carolina.

12

That the Court erred in holding that the Act in question, namely, the Gasoline Tax Act of 1930, is not a license tax, which erroneous holding was the basis of its holding that said Act was not repugnant to Section 1, Article 10 of the Constitution of South Carolina, which provides that a license tax may be levied on "occupations and businesses alone"; it being submitted that the thing taxed herein was merely the owning and holding of one's own property which cannot be said to be either a business or an occupation, and that the Court erred in not holding the tax to be a license tax, and, therefore, repugnant to the aforesaid section of the State Constitution.

13

That the Court erred in not holding that the tax in question was not a property tax, and hence was repugnant to Section 1, Article 10 of the Constitution of South Carolina, which provides that "the General Assembly shall provide by law for a uniform and equal rate of assessment in taxation," and in not holding that for said reasons said tax was unconstitutional in that it levied a tax amounting to forty-eight per cent, whereas the property tax in force in [fol. 41] the County in question is but forty-seven mills on the dollar.

For which errors the plaintiff-petitioner and appellant prays that the decree and opinion of the Supreme Court of South Carolina dated and filed the 13th day of April, 1931, in the above entitled cause, be reversed, and that the cause be remanded with directions to said Court to grant the order of injunction sought; and for such other and further relief as may be proper in the premises.

P. F Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Appellant's Attorneys.

[fol. 42] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

NOTICE OF APPEAL WITH ACCEPTANCE OF SERVICE

To W. G. Query, J. P. Derham, and F. C. Robinson, personally and as members of South Carolina Tax Commission, or their attorneys:

Please to take notice that the plaintiff and peti-oner in the above entitled suit has appealed and does appeal to the Supreme Court of the United States from the decree and final order and judgment entered and granted by the Supreme Court of South Carolina on the 13th day of April, 1931, in so far as the same refuses to grant the permanent injunction sought by the plaintiff or petitioner herein, and in so far as the same grants final judgment against the plaintiff and in favor of the defendants herein.

Attached hereto are copies of the petition for appeal, order allowing appeal, assignment of errors, citation, and supersedeas and cost bond.

Dated at Aiken, S. Car., June 10, 1931.

P. F. Henderson, Hendersons & Salley, Bomar & [fol. 43] Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Counsel for Gregg Dyeing Company.

Acceptance of Service

Service of the notice of appeal, with papers attached, as listed in the above entitled cause, is hereby accepted this 11 day of June, 1931, for and in behalf of the defendants and Appellee's herein.

J. Fraser Lyon, John M. Daniel, Atty. Gen'l., Their Counsel.

[fols. 44 & 45] Bond on appeal for $1,250.00 approved; omitted in printing.

[fols. 46 & 47] Citation, in usual form, showing service on J. Fraser Lyon and John M. Daniel, omitted in printing.

[fol. 48] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PRÆCIPE OF APPELLANT

The Clerk of the Supreme Court of South Carolina will please proceed to make up the transcript of record in the above entitled cause, including therein:

1. The whole of the printed transcript of record as used and submitted to the Supreme Court of South Carolina, the same being inclusive of the petition and complaint for injunction on the part of the plaintiff and petitioner, duly verified; the rule to show cause granted on July 12th, 1930, by Honorable Thomas P. Cothran, Associate Justice, the notice and demurrer on the part of the Defendant's, and three agreements and stipulations between counsel.

2. The opinion and final judgment of the Supreme Court of South Carolina, together with the dissenting opinion by Associate Justice Cothran.

3. Petition for appeal and supersedeas, and order granting the same, filed June —, 1931.

4. Assignment of errors, and petition for reversal, filed with petition for appeal.

5. Notice of appeal with acceptance of service thereof.

[fols. 49-54a] 6. Supersedeas and cost bond, with approval thereof.

7. Citation with acceptance of service.

8. This præcipe.

9. Designation of points relied on for reversal.

10. Clerk's certificate.

P. F. Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Plaintiff's-Appellant's Attorneys.

Due legal service of a copy of the foregoing præcipe is accepted this 11th day of June, 1931.

J. Fraser Lyon, John M. Daniel, Atty. Gen'l., As Attorneys for Defendants-Appellees.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 25, 1931

Counsel for the plaintiff in error or appellant herein designate as the points upon which they rely to reverse the judgment and final order of the Supreme Court of South Carolina which heard this cause, the points set out in the assignment of errors, (in which the same are more fully set out, all of which being relied upon), to-wit:

That the Supreme Court of South Carolina erred in making the decree herein, and in holding that the so-called Gasoline Tax Act of the State of South Carolina, approved April 4, 1930, (Acts of 1930, page 1390) is constitutional, and is not repugnant to the Commerce Clause of the Federal Constitution, and in not holding to the contrary that said Act is unconstitutional, and is repugnant to said Commerce Clause of the Federal Constitution, in that it makes the interstate origin of the gasoline in question the basis of classification in the imposition of the tax; and in that the Court erred in further holding that said Act is constitutional, and is not repugnant to said Commerce Clause of said Federal Constitution, and in not holding to the contrary that the Act is unconstitutional and repugnant to said [fol. 57] Commerce Clause of the said Federal Constitution inasmuch as it levies a tax on gasoline bought outright by plaintiff before its shipment in interstate commerce, and not thereafter resold within the State.

Further, in that said Court erred in holding that the Act in question is not a License Tax Act; and that said Court should have held that said Act was a License Tax Act, and as such is unconstitutional and repugnant to the Commerce Clause of the Federal Constitution, because it makes both the act of storing the gasoline in question within the State of South Carolina and its importation in interstate commerce the joint acts which give rise to the License Tax imposed; and that the Court erred in not holding that a License Tax cannot be laid in part on interstate commerce.

That the Court further erred in not holding that the Act in question is repugnant to both the Commerce Clause of the Federal Constitution and to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution in that it discriminates against gasoline produced by other States and places the Tax levied only upon persons and corporations which import in interstate commerce gasoline, and store the same for twenty-four hours, it affirmatively appearing among other things that gasoline is produced and manufactured within South Carolina, which gasoline is not reached by the Act in question.

That the Court further erred in not holding that the plaintiff was entitled to an injunction, there being no adequate remedy at law open to the plaintiff, and that the respondents were threatening to collect a tax upon said gasoline brought in under the circumstances appearing in the admitted state of facts; and that the Court erred in consid- [fol. 58] ering and holding that upon passing upon the constitutionality of the Act in question that other Acts of the General Assembly of said State may be considered in so doing, and that the other Acts may supplement and complement the constitutionality of the Act in question. And that the terms of other Acts may be invoked in testing the constitutionality of the Act referred to, although said other Acts levy a tax only upon sales of gasoline, and do not attempt to tax importation in interstate commerce and storage alone.

That the Supreme Court of South Carolina further erred in holding that the Acts of 1925 and 1929, referred to by them, purport to place a tax upon gasoline merely used within the State of South Carolina, and in holding that the Standard Oil Company is legally forced and required to pay a gasoline tax in South Carolina upon gasoline used in its fleet of trucks in said State, and that the payment of a uniform gasoline tax of six cents per gallon is by Statute passed on to all users of gasoline within the State of South Carolina; and in holding that the Statutes of the State of South Carolina place a tax of all gasoline consumed in the State.

That the Supreme Court of South Carolina further erred in holding that the Act in question is not a License Tax Act, and based upon said erroneous holding in failing to

hold that said Act is unconstitutional under Section One, Article Ten of the Constitution of the State of South Carolina, which provides that a License Tax may be levied on "occupations and businesses alone," it appearing affirmatively that the plaintiff was not operating a storage business, but was only holding its own property until it could use it.

That the Supreme Court of South Carolina erred in not holding that the tax in question was in reality a property [fol. 59] tax, and hence was repugnant to Section One, Article Ten, of the Constitution of South Carolina, which provides that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation," and in not holding that the proposed proceeding lays a tax of forty-eight per cent on the gasoline in question, whereas the property tax in force in the County in which plaintiff owns a manufacturing plant is but forty-seven mills on the dollar.

And Appellant designates as the parts of the record which it thinks necessary for the consideration of this appeal the transcript of record before the Supreme Court of South Carolina, comprising the petition or complaint for injunction, duly verified, the rule to show cause executed by a Justice of the Supreme Court of South Carolina, the notice and demurrer on the part of the defendant, and three stipulations and agreements of counsel therein incorporated, and the decision and final judgment of the Supreme Court of South Carolina, rendered and filed on April 13, 1931, the petition for appeal and supersedeas and order granting the same, the assignment of errors and petition for reversal with petition for appeal, the notice of appeal, the supersedeas and cost bond with approval thereof, the citation, the præcipe, this designation of points relied on for reversal, and designation of parts of the record to be printed, together with acceptance of service on all of said papers, and the Clerk's Certificate.

P. F. Henderson, Hendersons & Salley, Bomar & Osborne, Perrin & Tinsley, Haynesworth & Haynesworth, Appellant's Attorneys.

Due legal service of a copy of the foregoing designation [fols. 60 & 61] of points relied on for reversal, and all parts

of record necessary to the consideration of the appeal, is hereby accepted.

John M. Daniel, Atty. Gen'l; J. Fraser Lyon, Appellees' Attorneys.

[fol. 62] [File endorsement omitted.]

Endorsed on cover: File No. 35,984. South Carolina Supreme Court. Term No. 170. Gregg Dyeing Company, appellant, vs. W. G. Query, J. P. Derham, and F. C. Robinson, personally and as members of South Carolina Tax Commission. Filed June 20, 1931. File No. 35,984.

IN SUPREME COURT OF THE UNITED STATES

STIPULATION AND ADDITION TO RECORD—Filed Oct. 29, 1931

IN SUPREME COURT OF SOUTH CAROLINA

GREGG DYEING COMPANY, Appellant,

vs.

W. G. QUERY et al., Respondents

CERTIFICATE

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, do certify that the attached printed sheet which is identified by my signature, is a true and correct copy of a stipulation of counsel which was added to and comprised a portion of the record which was before the Supreme Court of South Carolina upon the argument and trial of the above entitled cause in said Court.

Given under my hand and seal of the Supreme Court of South Carolina, this 27th day of October, 1931.

J. B. Westbrook, Clerk of Supreme Court of South Carolina. (Seal Supreme Court of South Carolina.)

STIPULATION OF COUNSEL

It is agreed that the following facts stand as admitted and as if they were alleged in the complaint, and that the Supreme Court of South Carolina be requested to consider them in passing upon the issues herein; namely:

"That much of the gasoline produced by the Standard Oil Company in its refinery referred to in the complaint and much gasoline which is brought into the State by the Oil Companies for re-sale, is actually stored within the State for more than twenty-four hours before it is sold or used, and is not taxed for its importation and/or storage in this State, but is taxed when it is sold or used in this State by such Oil Companies. That such gasoline produced in the refinery of the Standard Oil Company referred to in the

complaint, as is shipped to other states than South Carolina, is not taxed in South Carolina."

We consent:

Haynsworth & Haynsworth, Bomar & Osborne, Perrin & Tinsley, Hendersons & Salley, Plaintiff's Attorneys. J. Fraser Lyon, Defendants' Attorneys.

A true copy.

J. B. Westbrook, Clerk Supreme Court of South Carolina. (Seal Supreme Court of South Carolina.)

[File endorsement omitted.]